Supreme Court of the United States

OCTOBER TERM—1944

No. 632

GRACE LINE, INC.,

Petitioner,

against

CUBA DISTILLING COMPANY, INC. and DEFENSE SUPPLIES CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Respondents.

ANDREW J. MCELHINNEY,
Of Counsel.

JUDICIAL PRINTING CO., INC., 82 BEEKMAN ST., N. Y.—BARCLAY 7—3648-9 188

Supreme Court of the United States

OCTOBER TERM—1944

No. 632

GRACE LINE, INC.,

Petitioner,

against

CUBA DISTILLING COMPANY, INC. and DEFENSE SUPPLIES CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The District Court (HULBERT, *D. J.*) and the Circuit Court of Appeals (LEARNED HAND, SWAN and CLARK, *C. J. J.*) by concurrent findings of fact have held that the petitioner's vessel "Lara" and the steamship "Cassimir" owned by the respondent, Cuba Distilling Company, Inc., were both guilty of faults contributing to the collision between them. The questions presented were pure questions of fact.

In its effort to present to this Court a question of law, the petitioner assumes that the faults of the "Lara" were committed *in extremis*. This assumption is contrary to the findings of the courts below. One of the findings of the District Court was as follows (R. p. 301):

> "XI. The errors of the 'Lara' were not errors *in extremis*."

In a *per curiam* opinion affirming the judgment of the District Court, the Circuit Court of Appeals did not disturb this finding, but merely quoted from one of its earlier decisions to the effect that even *in extremis* a navigator is not wholly relieved from responsibility. Obviously, the question when the situation confronting a navigator becomes so desperate that he ceases to be accountable for his actions is a pure question of fact. Both of the lower courts found that the situation confronting the navigator of the "Lara" was one in which he could and should have averted collision by the exercise of reasonable care and skill (See Fdg. 17, R. p. 297). Moreover, they both found that a proper lookout was not maintained on the "Lara." (Con. VIII 1, R. p. 300; R. p. 321). Failure to keep a good lookout is certainly not a fault which can be excused on the ground that it is committed *in extremis*.

Moreover, the District Court also held the "Lara" at fault because she failed to sound a one blast signal when she put her rudder hard right (Con. VIII 3, R. p. 300) and because she failed to turn on her navigation lights immediately *or at any time until about the moment of contact* (Con. VIII 6, R. p. 300), thereby leaving the "Cassimir" to navigate without adequate knowledge of the proposed or actual movements of the "Lara." Furthermore, the District Court also held the "Lara" at fault because "she continued to turn to the right at full speed and failed to stop or reverse her engines until collision could not be avoided" (Con. VIII 7, R. p. 300). The Circuit Court of Appeals in its *per curiam* opinion did not comment on these additional faults of the "Lara" found by the District Court, evidently considering the case too clear to require further discussion.

There is no conflict in the decisions cited in the petitioner's brief relating to faults committed *in extremis*. Every

case involving this principle must depend upon its own facts and circumstances. The four judges who have considered the testimony in this case have unanimously held that the facts and circumstances of this collision were not in fact such as to excuse the plain and gross faults of the "Lara," and certainly not such as to excuse "the absence of all clear thinking" on the part of the officer in charge of her navigation (R. p. 320).

The petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit to review the decisions below in this case should be denied.

Respectfully submitted,

D. Roger Englar,
Leonard J. Matteson,
Counsel for Respondents.

Andrew J. McElhinney,
Of Counsel.